

January 2008

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Recommended Citation

Ruth S. Uselton, *Critical Mass: Restricting Advocates' Rights Under the Community Reinvestment Act*, 53 N.Y.L. SCH. L. REV. 299 (2008-2009).

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Critical Mass: Restricting Advocates' Rights
Under the Community Reinvestment Act

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*An informed citizenry is vital to the functioning of a democratic society.*¹

I. INTRODUCTION

The Community Reinvestment Act (“CRA”) was born of noble ideals and strong convictions, but like most legislation the end result was far from perfect. Nevertheless, the CRA brought attention to the practice of “redlining,” a practice by which banks refuse to lend to predominantly minority and/or low-income neighborhoods. It also increased the monitoring and regulation of bank lending practices.² Since its passage in 1977, however, the banking and lending landscape has dramatically changed—making the CRA an anachronism that does not adequately protect communities.³

Attorneys and community groups have therefore developed new strategies through the use of the Freedom of Information Act (“FOIA”) to make the CRA work the way it was intended—to protect communities from unscrupulous banking practices.⁴ However, in *Inner City Press v. Board of Governors of the Federal Reserve System*, the Second Circuit shed new light on an old rule that could severely limit the information available to community economic development advocates through FOIA requests.⁵ The Second Circuit based its holding on an interpretation of a FOIA exemption set forth by the D.C. Circuit Court in *Critical Mass Energy Project v. Nuclear Regulatory Commission*.⁶ Although the Second Circuit did not expressly adopt the *Critical Mass* rule, it all but invited the argument for full adoption of the rule in future cases regarding FOIA requests for CRA information.⁷

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1. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (alteration of original).
 2. See generally Peter P. Swire, *The Persistent Problem of Lending Discrimination: A Law and Economics Analysis*, 73 TEX. L. REV. 787, 802–05 (1995) (discussing the various racially discriminatory practices of lending institutions and the legislation that has been enacted over time to combat these practices).
 3. See 12 U.S.C. § 2902(2) (2006) (defining the scope of the CRA regulations as applying to “insured depository institution[s]” but not to lenders who do not provide depository services) (emphasis added). See generally Allen N. Berger, Anil K. Kashyap & Joseph M. Scalise, *The Transformation of the U.S. Banking Industry: What a Long, Strange Trip It’s Been* (Wharton Sch. Ctr. for Fin. Inst., Working Paper No. 96-06, 1995) (analyzing the dramatic changes in the U.S. commercial banking industry over the last fifteen years); Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1463, 1466 (1994) (finding that “[t]he ongoing consolidation of the banking industry has had and will continue to have a profound negative impact in low- and moderate-income communities and in non-White communities”).
 4. See RICHARD D. MARSICO, *DEMOCRATIZING CAPITAL: THE HISTORY, LAW, AND REFORM OF THE COMMUNITY REINVESTMENT ACT* 12–15 (2005) (noting that Congress passed the CRA to put an end to two banking practices—redlining and capital export—which were highly destructive of urban and minority neighborhoods).
 5. 463 F.3d 239 (2d Cir. 2006).
 6. 975 F.2d 871 (D.C. Cir. 1992).
 7. See *Inner City Press*, 463 F.3d at 245 n.6 (“We have not previously adopted the *Critical Mass* amendment to the *National Parks* test. The parties here do not argue for its adoption and the district court did not apply it in its decision. We decline to adopt nostra sponte the *Critical Mass* test.”) (citation omitted). However, for all intents and purposes, the court took a step toward adopting *Critical Mass* in holding that an “agency must both possess and exercise the legal authority to obtain information for the resulting submission of information to be deemed ‘mandatory’ under the *National Parks* test.” *Id.* at 248. The *National Parks* test, referred to by the court, had traditionally been the test used in FOIA exemption 4

This note contends that the Second Circuit's adoption of the *Critical Mass* rule, in the context of FOIA requests for CRA information, would substantially impair the efficacy of the CRA and eliminate a valuable tool in the community advocate's fight to protect New York communities from predatory lending practices. Part II of this note outlines the history and purpose of the CRA. Part III provides a brief overview of the securitization of subprime loans and the role banks play in this process, and argues that a bank's role in the securitization process is essential information in determining a bank's CRA performance. Part IV explains the use of FOIA requests to obtain information regarding a bank's lending and investment practices. Part V examines how banks use the confidentiality exception of FOIA to resist providing information on their lending practices. Finally, Part VI argues that the *Critical Mass* rule contradicts the purposes of the CRA and FOIA and argues that adoption of this rule in the Second Circuit would mark a dangerous step backward at a time when there is a stronger need for greater transparency and accountability among communities, regulators, and financial institutions.⁸

II. HISTORY & PURPOSE OF THE COMMUNITY REINVESTMENT ACT

The primary purpose of the Community Reinvestment Act was to combat a banking practice that was commonly referred to as "redlining" and to reverse a growing trend of "exporting capital" out of low- and moderate-income communities.⁹ Redlining is a practice by which banks would take out a map and literally draw a red line around certain neighborhoods (largely low-income and minority neighborhoods) and "refuse[] to lend there because of perceived credit risks associated with the neighborhood."¹⁰ Hence, it became known as a predatory refusal to lend. Even though many redlined neighborhoods were creditworthy, they were nevertheless ab-

cases, until the D.C. Circuit's holding in *Critical Mass*. The *National Parks* test and the influence of *Critical Mass* will be discussed *infra* in Part V of this note.

8. See, e.g., Michael M. Grynbaum, *Obama Urges Wall Street to Protect the Middle Class*, N.Y. TIMES, Sept. 18, 2007, at A25 (calling for more transparency in the financial industry, specifically in the housing market and arguing that federal laws are needed to prevent mortgage fraud); Arthur Levitt, Jr., *Conflicts and the Credit Crunch*, WALL ST. J., Sept. 7, 2007, at A15 (comparing the subprime mortgage crisis to the Enron-era scandals and noting that they share the same root causes: lack of accountability and little transparency). See generally Keith R. Fisher, *Toward a Basal Tenth Amendment: A Riposte to National Bank Preemption of State Consumer Protection Laws*, 29 HARV. J.L. & PUB. POL'Y 981 (2006) (discussing banks' use of affiliates or contractual relationships to use predatory lending tactics in the context of usurping state consumer protection laws through federal preemption—a different yet analogous scenario).
9. MARSICO, *supra* note 4, at 12.
10. *Id.*; see also Swire, *supra* note 2, at 800–01 ("The lasting damage done by the national government was that it put its seal of approval on ethnic and racial discrimination and developed policies which had the result of the practical abandonment of large sections of older, industrial cities. More seriously, Washington actions were later picked up by private interests, so that banks and savings-and-loan institutions institutionalized the practice of denying mortgages 'solely because of the geographical location of the property.'").

solutely cut off from access to loans.¹¹ Moreover, banks would take the deposits from these communities and “export” that capital to originate loans in other areas—largely suburban, middle- and upper-income neighborhoods.¹² This pattern of redlining and exporting capital effectively disenfranchised entire neighborhoods by eliminating opportunities to build credit—credit that could have helped to build equity in a home, to start a small business, or to send a child to college.¹³

The CRA provides that the appropriate federal agency must use its power to thoroughly examine a bank’s record of meeting community credit needs.¹⁴ In enacting the CRA, Congress set forth its findings and purposes in language that was noticeably vague:

The Congress finds that—

(1) regulated financial institutions are required by law to *demonstrate that their deposit facilities serve the convenience and needs of the communities* in which they are chartered to do business;

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11. 123 CONG. REC. 17,630 (1977). More than a decade after the passage of the CRA, studies continued to show pervasive discriminatory lending practices based on race. Alicia H. Munnell et al., *Mortgage Lending in Boston: Interpreting HMDA Data 1* (Fed. Reserve Bank of Boston, Working Paper No. 92-7, 1992). “The Home Mortgage Disclosure Act (HMDA) data for 1990 . . . showed substantially higher denial rates for black and Hispanic applicants than for white applicants. These minorities were two to three times as likely to be denied mortgage loans as whites. In fact, high-income minorities in Boston were more likely to be turned down than low-income whites.” *Id.* Presently, thirty years after the passage of the CRA, racial discrimination in home mortgage lending persists. RICHARD D. MARSICO, N.Y. LAW SCH. ECON. JUSTICE PROJECT, *THE HIGHER COST OF BEING AFRICAN-AMERICAN OR LATINO: SUBPRIME HOME MORTGAGE LENDING IN NEW YORK CITY 1* (2007). A study of the 2005 Home Mortgage Disclosure Act data for New York City found that nearly half (45.9%) of all HMDA loans to African-Americans were subprime—three times higher than the percentage of subprime loans to whites (16.6%); and, more than 40% of all home purchase loans to residents of minority neighborhoods were subprime—more than six times higher than the percentage to residents of predominantly white neighborhoods (6.3%). *Id.* at 3–4. Clearly, the decline of redlining has not deterred discriminatory lending practices; however, this should provide incentive for strengthening the CRA, rather than a reason for stripping it of its strength.
12. *See Community Credit Needs: Hearings on S. 406 Before the S. Comm. on Banking, Housing, and Urban Affairs*, 95th Cong. 2 (1977) (opening statement of William Proxmire, Chairman, S. Comm. on Banking, Housing, and Urban Affairs); MARSICO, *supra* note 4, at 12–13.
13. *See generally* Swire, *supra* note 2, at 791. In discussing the disturbing ripple effect of discrimination through disparate treatment in lending opportunities, Swire states that
 statistical discrimination can persist over time. If the practice is profit-maximizing, new lenders will not be able to enter and eliminate the race-based practice. A second way for discrimination to persist is if the disadvantaged group perceives the existence of discrimination, and therefore invests less in creditworthiness. Borrowers who believe they will not receive fair access to credit in the future may rationally work less hard to pay current obligations—the perceived existence of discrimination can cause the borrower to have a lower expected value from efforts to maintain good credit.
Id. (footnote omitted).
14. *See* 12 U.S.C. § 2901(b) (2006); *Lee v. Bd. of Governors of the Fed. Reserve Sys.*, 118 F.3d 905, 913 (2d Cir. 1997).

(2) the convenience and needs of communities include the need for credit services as well as deposit services; and

(3) regulated financial institutions have a continuing and *affirmative obligation* to help *meet the credit needs of the local communities* in which they are chartered.¹⁵

Congress's stated purpose in enacting the CRA was as follows:

(b) It is the purpose of this chapter to require each appropriate Federal financial *supervisory agency to use its authority when examining financial institutions*, to encourage such institutions to help *meet the credit needs of the local communities* in which they are chartered consistent with the safe and sound operation of such institutions.¹⁶

The regulations enforcing the statute's purpose do not offer much additional clarity.¹⁷ Although commentators generally agree that there is a need for community reinvestment regulation to deter the exporting of capital out of low-income communities,¹⁸ few people agree on the best way to implement such regulation.¹⁹ The most ardent opponents of the CRA argue that any attempt to regulate a bank's lending within particular communities is tantamount to credit allocation (e.g., lending quotas or lending affirmative action), which undermines the free market and dangerously imposes on the safe and sound lending practices upon which the banking industry rests.²⁰

15. 12 U.S.C. § 2901 (2006) (emphasis added).

16. *Id.* § 2901(b) (emphasis added).

17. *See Lee*, 118 F.3d at 913 (“[A]ny attempt to glean substance from the CRA is met with the reality that the statute sets no standards for the evaluation of a bank’s contribution to the needs of its community.”) (citation omitted); A. Brooke Overby, *The Community Reinvestment Act Reconsidered*, 143 U. PA. L. REV. 1431, 1431 (1995) (explaining that the CRA “has been the focus of intense criticism within the financial community” and that regulators have yet to implement it properly).

18. *See, e.g., MARSICO, supra note 4*, at 173 (noting that the CRA was enacted to stop the practice of redlining and to increase bank lending in low- and moderate-income communities).

19. Overby, *supra note 17*, at 1435.

20. *See, e.g., Jonathan R. Macey & Geoffrey P. Miller, The Community Reinvestment Act: An Economic Analysis*, 79 VA. L. REV. 291, 295 (1993). The authors argue:

The CRA impairs the safety and soundness of an already overstrained banking industry: it promotes the concentration of assets in geographically nondiversified locations, encourages banks to make unprofitable and risky investment and product-line decisions, and penalizes banks that seek to reduce costs by consolidating services or closing or relocating branches. The statute, moreover, imposes a significant tax on bank mergers and deters transactions that would otherwise improve the efficiency and solvency of the nation’s banking system.

Id. But *see MARSICO, supra note 4*, at 173–74. Marsico responds that:

Congress intended the CRA to influence lenders to make more loans in redlined neighborhoods but not to allocate credit. . . . The CRA does not establish loan quotas or mandatory penalties for failure to comply. . . . [R]elevant data is consistent with the conclusion that the CRA has influenced banks to lend hundreds of billions of dollars to LMI and other underserved neighborhoods

CRITICAL MASS

The CRA authorizes four federal regulatory agencies to oversee the community reinvestment practices of banking institutions. These agencies include: the Board of Governors of the Federal Reserve System (“FRB”), the Federal Deposit Insurance Corporation (“FDIC”), the Office of the Comptroller of the Currency (“OCC”), and the Office of Thrift Supervision (“OTS”).²¹

Each of these four federal agencies is required to conduct periodic CRA performance evaluations of the banks it regulates.²² The purpose of these evaluations is to gather data, largely through the Home Mortgage Disclosure Act (“HMDA”), which tracks the number, type, and interest rate of bank loans, as well as loan applicant and neighborhood characteristics (e.g., ethnicity, race, and income).²³ This data is collected by the Federal Reserve and included in a publicly available CRA performance evaluation that is prepared by the bank’s regulatory agency.²⁴ These evaluations rate the bank as: “Outstanding,” “Satisfactory,” “Needs to improve,” or “Substantial non-Compliance.”²⁵ An important factor in determining a bank’s record of meeting community credit needs is whether, and to what extent, the bank participates in subprime and other potentially predatory lending practices.²⁶

Id.

21. 12 U.S.C. § 2902 (2006). The OCC regulates national banks; the FRB regulates state chartered banks that are members of the Federal Reserve System and bank holding companies; the FDIC regulates state chartered banks and savings banks that are not members of the Federal Reserve System and the deposits of which are insured by the FDIC; and the OTS regulates savings associations, the deposits of which are insured by the FDIC, and savings and loan holding companies. *Id.*
22. *Id.* § 2903.
23. 12 C.F.R. § 203.4 (2008) (also known as “Regulation C”). These reporting requirements outlined in the Code of Federal Regulations are authorized by the HMDA. 12 U.S.C. § 2801 (2006). The purpose of HMDA is to provide the public with loan data:
 - (i) To help determine whether financial institutions are serving the housing needs of their communities; (ii) To assist public officials in distributing public-sector investment so as to attract private investment to areas where it is needed; and (iii) To assist in identifying possible discriminatory lending patterns and enforcing antidiscrimination statutes.12 C.F.R. § 203.1 (2008).
24. 12 U.S.C. § 2906 (2006). The written evaluation may also have a confidential section, which can include named customers, employees, or officers, and statements that are “too sensitive” to disclose to the public. *Id.* § 2906(c).
25. *Id.* § 2906(b)(2).
26. *See generally* ROBERTO G. QUERCIA, MICHAEL A. STEGMAN & WALTER R. DAVIS, CTR. FOR CMTY. CAPITALISM, KENAN INST. FOR PRIVATE ENTER., THE IMPACT OF PREDATORY LOAN TERMS ON SUBPRIME FORECLOSURES: THE SPECIAL CASE OF PREPAYMENT PENALTIES AND BALLOON PAYMENTS 2, 4–5 (2005) (explaining the devastating effects of subprime lending in communities; noting that in the fourth quarter of 2003, more than one in twenty subprime borrowers was at risk of foreclosure, but only one in one hundred prime borrowers faced the same risk); Kathleen C. Engel & Patricia A. McCoy, *Turning a Blind Eye: Wall Street Finance of Predatory Lending*, 75 *FORDHAM L. REV.* 2039, 2040 (2007) (noting the concern that securitization facilitates predatory lending and that most subprime loans are securitized, yet little has been done to address this problem at the secondary market level). Studies continue to show that subprime home mortgage loans lead to higher rates of foreclosure, and often these foreclosures wipe out entire blocks and neighborhoods. Therefore, the logical conclusion is that sub-

In addition, the agency will examine a bank's community economic development practices each time the bank files a merger or expansion application with the agency.²⁷ Again, the agency conducts a review of the bank's lending practices and past CRA performance evaluations, and allows the community to make public comments regarding the bank's community economic development history.²⁸ The public comment period is important for community advocates because it is the only recourse available to communities under the CRA. The CRA does not grant individuals any civil right of action against a bank that is not meeting the community's credit needs.²⁹ After taking into account its own review of a bank and any public comments on a bank's CRA activities, the agency may determine that the bank has not met the community's credit needs, in which case the agency may reject or delay the bank's merger/expansion plans.³⁰ Thus, access to a bank's lending and investment information is critical for community advocates wishing to publicly comment on a merger/expansion plan.

In the course of turning over information to the appropriate regulatory agencies, either for standard CRA performance evaluations or for merger/expansion applications, banks may request that some items remain confidential.³¹ Banks do so for obvious reasons—some of the information may be proprietary information or trade secrets, and some of the information might be damaging for the bank's public relations (for example, if evidence of predatory lending patterns is apparent). Herein lies the tension between the CRA, which requires public disclosure of certain bank lending practices affecting the community,³² and FOIA Exemption 4, which, in

prime lending, intensified by securitization, has caused a large loss of capital in many communities, which is precisely the kind of activity the CRA was designed to monitor.

27. 12 C.F.R. § 228.29(a)(1)(ii) (2008).

28. *Id.* §§ 228.29(b), 228.43(a)(1).

29. *See* 12 U.S.C. § 2906(a)–(b) (2006) (requiring the federal financial supervisory agencies to prepare written evaluations of banks' CRA performance and make this report available to the public). *See generally* E. L. Baldinucci, *The Community Reinvestment Act: New Standards Provide New Hope*, 23 *FORDHAM URB. L.J.* 831, 838 (1996) (referencing the three main purposes of the CRA regulations: “[1.] community delineation, [2.] disclosure, and [3.] compliance”); Scott L. Cummings, *Community Economic Development As Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 *STAN. L. REV.* 399, 441 n.212 (2001) (noting the influence of the CRA in “harness[ing] market forces” to empower communities to hold banks accountable to the citizens in the communities they serve); Gary M. Swidler, *Making the Community Reinvestment Act Work*, 69 *N.Y.U. L. REV.* 387, 396–97 (1994) (noting the 1989 congressional amendments to the CRA, which require “that banks disclose publicly regulators’ written evaluations of their CRA performance”).

30. 12 C.F.R. § 228.29(c) (2008) (“A bank’s record of performance may be the basis for denying or conditioning approval of an application”); *see also* Baldinucci, *supra* note 29, at 841 (noting that community based organizations “[have taken] the lead in using the CRA to improve bank services . . . by raising challenges to bank applications with the regulatory agencies on the grounds that banks have not satisfied their CRA obligations”).

31. *See* 12 U.S.C. § 2906(c) (2006) (“The confidential section shall also contain any statements obtained . . . by the appropriate Federal financial supervisory agency . . . which, in the judgment of the agency, are too sensitive . . . to disclose to . . . the public.”).

32. *See id.* § 2906(b).

part, provides a narrow exemption from public disclosure of the information if such disclosure would impair the regulatory agency's ability to get information from a bank in the future.³³

Community advocates wishing to make public comments regarding a bank's lending practices may seek disclosure of the bank's relationship with subprime lenders, the bank's history of purchasing bundles of subprime mortgages on the secondary markets (a.k.a. mortgage-backed securities), and other transactions affecting borrowers in the community.³⁴ Despite the clear relevance of this information to a bank's CRA performance history, obtaining access to this information can be quite difficult for several reasons. Banks do not necessarily want to disclose their active involvement in the subprime market, as seen by the litigation that ensued in *Inner City Press*. Additionally, the subprime market involves so many actors that tracing certain transactions back to a particular bank may be quite difficult and cost-prohibitive for community economic development advocates.³⁵

The CRA has been criticized as an "amorphous statute" that provides little direction for courts or agencies charged with CRA oversight.³⁶ The Act's major frailty lies in the fact that it does not enunciate clear standards by which to measure a bank's performance in meeting community credit needs.³⁷ To make matters worse, the federal regulatory agencies may rely on this lack of specificity to demand as little as possible from the banks they evaluate—to avoid conflict with the banks and maintain cordial relationships with them.³⁸ However, community advocates cannot

33. See 5 U.S.C. § 552(b)(4) (2006) (stating that matters exempt from disclosure include "trade secrets and commercial or financial information obtained from a person and privileged or confidential").

34. See generally Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1364–65 (2002) (listing the predatory lending practices that should bar banking entities from receiving CRA credit).

35. See generally *Subprime Mortgage Market Turmoil: Examining the Role of Securitization: Hearing Before the Subcomm. on Securities, Insurance, and Investments of the S. Comm. on Banking, Housing, and Urban Affairs*, 110th Cong. 20 (2007) [hereinafter *Subprime Mortgage Hearing*] (statement of Christopher L. Peterson, Associate Professor of Law, University of Florida) (arguing that "the opacity of securitization deals makes successful consumer enforcement of their rights cost prohibitive").

36. See *Inner City Press*, 463 F.3d at 246 n.7 (quoting *Lee*, 118 F.3d at 913).

37. See *Lee*, 118 F.3d at 913 ("[A]ny attempt to glean substance from the CRA is met with the reality that the statute sets no standards for the evaluation of a bank's contribution to the needs of its community.") (citation omitted).

38. Thus, it seems apparent that regulatory agencies are consistently conflicted over their role in how far to go to regulate industries. This issue was recently litigated by the Environmental Protection Agency in *Massachusetts v. EPA*. See 127 S. Ct. 1438 (2007). The EPA unsuccessfully argued that the Clean Air Act did not give the agency the authority to regulate greenhouse gas emissions. *Id.* at 1446. The Court found that although Congress may not have "appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete." *Id.* at 1462. By analogy, one could argue that although Congress did not foresee the impact of the securitization of subprime loans on community economic development, the CRA would be rendered obsolete if it did not require disclosures pertaining to new, predatory developments in the financial industry. The CRA may have

effectively evaluate a bank's lending practices if pertinent information is not publicly available.

III. THE SECURITIZATION OF SUBPRIME LOANS

Securitization is simply the process of converting illiquid assets into liquid ones. For example, in the mortgage industry, a loan originator may pool several mortgages together and sell that bundle of loans to convert the mortgages into cash. A common method that developed to churn more of these mortgages into cash for investors takes this a step further: the purchaser of the bundle of loans transfers that asset pool to a subsidiary, the subsidiary offers the assets to another entity (often a trust), which then becomes the issuer, and the issuer then uses an investment bank to repackage the assets into securities that can be priced and sold to investors in the secondary market.³⁹ This process of securitization also allows the secondary market to invest at relatively low risk, because the securitized mortgages have been many times removed from the originator. In other words, each time the assets (the pool of mortgages) are transferred to a new entity, they become increasingly sheltered from creditors in the event that the original lender goes bankrupt.⁴⁰

Securitization is a common tool in the world of structured finance;⁴¹ however, it becomes dangerous when applied to subprime loans, because it allows investors in the secondary market to “insulate themselves from the risks of predatory lending without having to monitor loan originations.”⁴² This insulation is likely one of the primary reasons for the high demand, and eventual collapse, of the subprime lending market.⁴³

effectively ended red-lining; however, new forms of discriminatory and predatory lending are constantly developing and should be addressed by the CRA.

39. For a more detailed explanation of the securitization of mortgages, see *Subprime Mortgage Hearing*, *supra* note 35, at 4 fig. A (providing a graphical display of the subprime home mortgage securitization structure).
40. Kathleen C. Engel & Patricia A. McCoy, *Predatory Lending: What Does Wall Street Have to Do with It?*, 15 HOUSING POL'Y DEBATE 715, 717 (2004).
41. See generally Engel & McCoy, *supra* note 34, at 1273 (explaining the development of the “securitization movement” in the 1970s and 1980s, and noting that, “by 1993, sixty percent of home mortgage loans were securitized”).
42. Engel & McCoy, *supra* note 40, at 716.
43. See *id.* (arguing that market discipline by the capital markets is not sufficient to stop predatory lending and that the lack of incentives for the market to curb predatory lending is a dangerous model); *Subprime Mortgage Hearing*, *supra* note 35, at 13 (noting that “[b]ecause securitization allows an originator to quickly resell its loans, the originator can make many loans while exposing only minimal assets to liability”). Moreover, “because the securitization conduit divides various lending tasks into multiple corporate entities—a broker, an originator, a servicer, a document custodian, etc.—the conduit tends to prevent the accumulation of a large enough pool of at risk assets to attract the attention of class action attorneys.” *Subprime Mortgage Hearing*, *supra* note 35, at 14; Kara Scannell & Deborah Solomon, *Unraveling the Subprime Mess*, WALL ST. J., Sept. 4, 2007, at A6 (quoting the Treasury's Assistant Secretary for Economic Policy, Phillip Swagel, who stated that “he expects the landscape for ratings concerns to change as Wall Street and Washington digest the lessons of the past few months. ‘There will probably

Securitization of home mortgages by the private sector, which did not start until the 1980s, was likely not on Congress's radar when the CRA was passed, and the practice was not explicitly addressed by the CRA.⁴⁴ Therefore, federal regulatory agencies assert that they have no authority under the CRA to require banks to disclose their investments in the secondary market of subprime mortgages.⁴⁵ The Second Circuit appears to agree with this argument, however inconsistent it may be.⁴⁶ Advocates are thus left with three options: wait for the legislature to address the problem; wait for continued litigation that may or may not follow current precedent; or, seek alternative means to obtain this valuable information.

To combat this void of information, community advocates have chosen to use alternative means. Specifically, they have used FOIA requests to extract more information about a bank's lending and investment practices.⁴⁷ Disclosures made pursuant to FOIA are much more expansive than the CRA performance evaluations published by the regulatory agencies, and FOIA allows any individual to request disclosure of non-confidential or proprietary information from any federal regulatory agency.⁴⁸ FOIA requests can therefore be a powerful tool for community economic development advocates. However, developments in FOIA case law in New York and the District of Columbia have effectively closed the door on FOIA requests for certain information pertinent to determining a bank's CRA performance.⁴⁹

From a community advocate's perspective, the participation of local and national banks in the subprime mortgage investment pool may be a critical factor in determining a bank's commitment (or lack thereof) to a particular community's economic development. Understanding the role of banks in the subprime loan securitization process helps to set the stage for the argument that the nature and extent of a bank's investments in subprime loan portfolios should be considered a key factor in the CRA evaluation process and therefore made available through public FOIA requests.⁵⁰

be a lot more scrutiny, in a sense, a lot more analysis being done of the underlying credit. And that's probably a good thing."").

44. See Engel & McCoy, *supra* note 26, at 2045 (noting that private sector mortgage securitization did not start until the 1970s).

45. See, e.g., *Inner City Press*, 463 F.3d at 246 n.7.

46. See *id.*

47. See Rainey, *infra* note 58, at 1431.

48. See HERBERT N. FOERSTEL, *FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: THE ORIGINS AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT 44 (1999)* ("Despite its many inadequacies, America's FOIA is recognized world-wide as trailblazing legislation. It established for the first time the statutory right of *any* person to access government information.").

49. See *Inner City Press*, 463 F.3d at 248; *Critical Mass*, 975 F.2d at 880.

50. See Engel & McCoy, *supra* note 34, at 1364–65 (arguing that banks should not be allowed to receive CRA credit for predatory loans and that banks that purchase bundled subprime loans on the secondary market should not receive CRA credit unless they can show that they have adequately investigated the originator's lending practices to ensure that they are non-discriminatory and non-predatory).

IV. THE FREEDOM OF INFORMATION ACT: A VALUABLE TOOL FOR CRA ADVOCATES

*[T]he [Freedom of Information Act] repeatedly states “that official information shall be made available ‘to the public,’ ‘for public inspection.’” There are, however, exemptions from compelled disclosure. . . . But these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.*⁵¹

The Freedom of Information Act was passed in 1966—a tumultuous time in American history.⁵² The military was in the thick of the Vietnam War, and the American government was fighting a fierce sociopolitical war against Communism. Just a few years prior to the enactment of FOIA, President John F. Kennedy was calling for the press to censor itself in the name of national security, stating that “[t]he danger has never been more clear and its presence has never been more imminent. It requires a change in outlook, a change in tactics, a change in missions—by the Government, by the people, by every business man, union leader and newspaper.”⁵³ The Central Intelligence Agency and the Federal Bureau of Investigation were also in their heyday—mining secret intelligence information and combating Communist uprisings. Secrets were rampant, and the unavailability of relevant information would lead to a crescendo of extreme public disillusionment guided by a disgruntled and hostile press.⁵⁴ Demonstrating this sentiment, Senator Edward V. Long quoted James Madison in a 1965 Senate Report supporting the enactment of FOIA, stating that “[k]nowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both.”⁵⁵ On the eve of FOIA’s passage, Donald Rumsfeld, then a young congressman from Illinois, reportedly called FOIA the most important piece of federal legislation in decades.⁵⁶ Understanding the can-

51. Dep’t of Air Force v. Rose, 425 U.S. 352, 361 (1976) (citation omitted).

52. It should be noted that FOIA was passed eleven years prior to the CRA—thus, many types of financial information that may now be included in CRA evaluations and merger applications could have been sought by community advocates through FOIA requests long before the CRA actually existed.

53. Russell Porter, *President Urges Press Limit News That Helps Reds*, N.Y. TIMES, Apr. 28, 1961, at 1 (noting that President Kennedy was urging the press to “accept the need for greater governmental secrecy on all matters affecting national security” and to demonstrate more “self-restraint” and “self-discipline” due to the Cold War and the threat of Communism).

54. See FOERSTEL, *supra* note 48, at 39 (“[In 1963,] [j]ust weeks before President Kennedy’s untimely death, Sigma Delta Chi, the professional journalistic fraternity, stated in the *New York Times* that freedom of information was at ‘the lowest ebb in history’ because of the ‘blanket of secrecy over the records of government.’”) (footnote omitted).

55. S. REP. NO. 89-813, at 2–3 (1965).

56. Editorial, *We Have a Right to Know*, DALLAS TIMES HERALD, June 16, 1966, at B17 (quoting Rep. Rumsfeld as stating that FOIA would address “a particular communications problem: government becoming so complex that it is difficult for the public to stay informed. When Government secrecy enters this picture, staying informed becomes impossible”); *see also* Charles Nicodemus, *House Shoo-In*:

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vass upon which FOIA was painted helps to highlight the policy concerns behind its statutory presumption in favor of disclosure.

Today, the same concerns that prompted the enactment of FOIA have been reiterated by the 110th Congress:

[T]he American people believe that . . . our constitutional democracy, our system of self-government, and our commitment to popular sovereignty depends upon the consent of the governed; . . . such consent is not meaningful unless it is informed consent; . . . as Justice Black noted[,] . . . ‘The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees.’⁵⁷

The central purpose of FOIA is to open agency doors to public inquiry.⁵⁸ Congress intended that FOIA maintain a presumption favoring disclosure, unless the information sought falls under one of the Act’s specified nine exemptions.⁵⁹ This presumption effectively enabled community advocate groups like Inner City Press

‘Freedom of Information’ Bill, CHICAGO DAILY NEWS, 1966. The author quotes Rep. Rumsfeld explaining the need for the passage of FOIA:

The unanimous action after years of delay results from the growing size and complexity of the federal government, from its increased role in our lives, and from the increasing awareness by Americans of the threat involved in government secrecy on vital records effecting their fate. . . . [W]ith the continuing tendency toward managed news and suppression of public information that the people are entitled to have, the issues have at last been brought home forcefully to the public.

Id.

57. Freedom of Information Act Amendments of 2007, H.R. 1309, 110th Cong. § 2(1)(A)–(C) (2007) (citation omitted).

58. See Richard L. Rainey, *Stare Decisis and Statutory Interpretation: An Argument for a Complete Overruling of the National Parks Test*, 61 GEO. WASH. L. REV. 1430, 1431 (1993); see also S. REP. NO. 89-813, at 38 (1965) (noting that the enormity of the U.S. government and its hundreds of agencies, departments, and branches militates in favor of having an “information policy of full disclosure”). The 1965 Senate Report concluded by stating:

The committee feels that this bill, as amended, would establish a much-needed policy of disclosure, while balancing the necessary interests of confidentiality. A government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty.

S. REP. NO. 89-813, at 45.

59. See *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (citing *Rose*, 425 U.S. at 361; 5 U.S.C. § 552(a)(4)(B) (2006)) (“[E]xemptions [from disclosure set forth in FOIA] ‘must be narrowly construed’ [and] ‘the burden is on the agency to sustain its action.’”); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 221 (1978) (“[U]nless requested material falls within one of these nine statutory exemptions, FOIA requires that records . . . be made available”); cf. *Gould v. N.Y. City Police Dep’t*, 89 N.Y.2d 267 (1996) (“All government records are . . . presumptively open for public inspection and copying unless they fall within [an] enumerated exemption of [Freedom of Information Law].”); *Capital Newspapers v. Whalen*, 69 N.Y.2d 246 (1987); Rainey, *supra* note 58, at 1431.

(“ICP”) to use FOIA requests to obtain information collected by regulatory agencies that was not disclosed in a bank’s publicly available CRA performance evaluation.⁶⁰

Disclosure has its limits, however, and Congress explicitly recognized this in enacting the nine exemptions to FOIA requests.⁶¹ This note will focus only on federal regulatory agencies’ use of FOIA Exemption 4 to avoid disclosure of bank subprime lending investments and activities. Exemption 4 is known as the “commercial or financial information exception,” and it contains three major elements that the government must prove in order for the exemption to apply: the information must be (1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential.⁶² The first two elements are straightforward, but the final element, “privileged or confidential,” has been subject to interpretation by the courts because it is not defined in the statute. Case law, primarily in the District of Columbia Circuit Court of Appeals, has developed around this issue, leading to the so-called *National Parks* test.⁶³ The discussion of case law that follows will shed further light on the application of Exemption 4.

V. CASE LAW AND THE *CRITICAL MASS* RULE

Exemption 4 litigation primarily focuses on whether the information sought is “privileged or confidential.”⁶⁴ Eight years after the passage of FOIA, the D.C. Circuit formulated a foundational rule to help courts decide this issue.⁶⁵ Now known as the *National Parks* test, the rule has two prongs and the government must satisfy at least one prong to gain the exemption from disclosure. Information will be deemed “confidential” under Exemption 4 if it would be likely to: (1) “impair the government’s ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.”⁶⁶

The rationale behind the “impairment” prong is that business organizations might withhold certain necessary information from regulatory agencies unless they

60. Inner City Press is a non-profit organization that conducts investigations and initiates litigation surrounding community economic development and lending discrimination. ICP has used FOIA requests to obtain bank lending information, but its attempts have been denied by the regulatory agencies and the Second Circuit has upheld these denials. See, e.g., *Inner City Press*, 463 F.3d 239.

61. See Stephen Gidiere & Jason Forrester, *Balancing Homeland Security and Freedom of Information*, 16 NAT. RESOURCES & ENV’T 139 (2002) (noting that FOIA “balances public disclosure against other important considerations,” such as national security in the post-September 11 context).

62. 5 U.S.C. § 552(b)(4) (2006); *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974).

63. See *Nat’l Parks*, 498 F.2d 765. Since FOIA requests apply to governmental regulatory agencies, the requests are most-often directed at agencies located in Washington, D.C. Therefore, the D.C. Circuit is recognized as the leading authority on FOIA law and its decisions are routinely adopted in a majority of jurisdictions when hearing the occasional FOIA case.

64. See, e.g., *id.*

65. See *id.*

66. *Id.* at 770.

are certain that the information will not be disclosed to the public.⁶⁷ The *National Parks* test is founded on the assumption that if business information turned over to a regulatory agency is *compelled* by that agency, there is “no danger that public disclosure will impair the ability of the Government to obtain the information in the future.” Thus, information that is compelled is in no need of protection under Exemption 4. By contrast, in the case of voluntarily submitted business information, the government’s interest is in ensuring the continued availability of such information, and therefore in such a case the government is required to demonstrate that this interest would be impaired if disclosure were required.

The *National Parks* test ostensibly protects the government’s ability to obtain information from the organizations it regulates by “encouraging cooperation” in assuring those organizations that the information they provide will remain confidential.⁶⁸ In other words, certain confidential information will be exempted from the disclosure requirements of FOIA in order to preserve congenial relations between government agencies and the organizations they regulate.

The *National Parks* test survived eighteen years as the lead decision interpreting Exemption 4, and it represents a careful balancing approach between the public’s right to access information and the need for government agencies to protect information that would not generally be available to the public.⁶⁹ But in 1992, the D.C. Circuit substantially altered the *National Parks* test in *Critical Mass Energy Project v. Nuclear Regulatory Commission*.⁷⁰

The *Critical Mass* decision confined the *National Parks* test to situations in which organizations are *required* to provide information to regulatory agencies. Thus, where “the information sought is given to the Government voluntarily, it will be treated as confidential under Exemption 4 if it is of a kind that the provider would not customarily make available to the public.”⁷¹ *Critical Mass* effectively eliminated the presumption in favor of disclosure of all information *voluntarily* provided to a regulatory agency.

Justice Ruth Bader Ginsburg, then a D.C. Circuit Judge, authored a prophetic dissent to the *Critical Mass* opinion, joined by the Chief Judge and Circuit Judges Wald and Edwards. The dissent argued that the new rule issued by the *Critical Mass* majority was a break from *National Parks* precedent and was not in line with the legislative purpose of FOIA.⁷²

67. The opinion argues a slippery slope theory that organizations “may decline to cooperate with officials and the ability of the Government to make intelligent, well informed decisions will be impaired.” *Id.* at 767.

68. *Id.* at 768.

69. *See id.* at 766–67.

70. 975 F.2d 871.

71. *Id.* at 872.

72. *Id.* at 882 (Ginsburg, J., dissenting). Judge Ginsburg contended: *Stare decisis*, though protractedly addressed, has not been appropriately observed in today’s decision. Nor has the guiding purpose of the Freedom of Information Act (FOIA)—to

Critical Mass dealt with a FOIA request for safety reports prepared by the Institute for Nuclear Power Operations and voluntarily submitted to the Nuclear Regulatory Commission on the condition of confidentiality.⁷³ Judge Buckley, writing for the majority, believed that the case presented an opportunity to amend the *National Parks* test and create a “categorical” exemption for information voluntarily provided to regulators.⁷⁴ The majority argued that this new test, automatically exempting voluntarily provided information, was objective and that “no case considered by this court in the past . . . would have been decided differently had this test been applied.”⁷⁵ At the time, the majority may have been correct. However, this backward-looking view was narrow-minded, as expressed by Judge Ginsburg’s dissent, which noted that “we have had rather few cases concerning voluntarily submitted information.”⁷⁶ Thus, the court failed to foresee the harm this decision could cause in future cases involving voluntary submissions.

Today, the dispute regarding FOIA requests for bank information *voluntarily* provided to regulatory agencies conducting CRA performance evaluations is precisely the type of scenario Judge Ginsburg foreshadowed. The CRA’s lack of clarity regarding the type of information regulatory agencies must use to develop appropriate CRA performance evaluations leaves regulators with little option other than to accept whatever information the bank is willing to provide. Therefore, the categorical exemption for voluntarily submitted information created by the *Critical Mass* decision could conceivably exclude most FOIA requests submitted to CRA regulatory agencies.

Judge Ginsburg’s prediction that the *Critical Mass* rule was too far reaching in its attempt to “categorize” all voluntary disclosures has recently become a reality in *Inner City Press*.⁷⁷ In *Inner City Press*, a community based organization, ICP, sought disclosure of certain information gathered by the FRB while conducting a CRA review for Wachovia’s merger application with SouthTrust.⁷⁸ The FRB is required to approve all bank mergers under the Bank Holding Company Act (“BHCA”).⁷⁹ Prior to submitting its merger application, Wachovia called the FRB to inquire whether it was required to provide information about its relationships with subprime lending clients (i.e., lenders that charge high loan interest rates—often associated with pred-

shed light on an agency’s performance of its statutory duties—been well served by the en banc disposition. I therefore dissent from the court’s FOIA and precedent unsettling judgment and opinion.

Id.

73. *Id.* at 874 (majority opinion).

74. *Id.* at 879.

75. *Id.*

76. *Id.* at 884 (Ginsburg, J., dissenting).

77. 463 F.3d 239.

78. *Id.* at 242.

79. 12 U.S.C. § 1842(a)(5) (2006).

atory lending).⁸⁰ The FRB answered that the information would be “helpful if public commentators question an applicant’s relationships with subprime lenders.”⁸¹ Thereafter, Wachovia provided this information in the form of an attachment (“Exhibit Three”) to the application, but requested that it be kept confidential.⁸²

Once the FRB completed its evaluation of the merger application, ICP made a FOIA request for this information.⁸³ As discussed in Part II of this note, community groups like ICP often review bank merger applications because they are permitted to submit comments on bank mergers under the provisions of the CRA regulations promulgated by the FRB.⁸⁴ The purpose of these public comments is to allow community groups to participate in the bank merger application process by highlighting banks that are not meeting the credit needs of their communities.⁸⁵ Arguably, an even more important outcome of the public comment process is that it attracts community and media attention to banks using unscrupulous lending practices and incentivizes banks to take prophylactic measures to reduce the use of potentially discriminatory lending practices.⁸⁶

Pursuant to ICP’s request, the FRB released portions of the merger application.⁸⁷ However, it withheld certain “confidential” documents, including Exhibit Three, which contained:

- (i) the names of nine of Wachovia’s commercial customers that make and/or purchase subprime residential mortgage loans; (ii) the specific amounts and some terms of Wachovia’s credit facilities to these customers; (iii) descriptions of other banking services Wachovia provides to, or other relationships with, these customers; (iv) financial data on Wachovia’s exposure and loan outstandings to commercial customers who engage in subprime lending; and (v) details regarding the due diligence Wachovia performs in evaluating particular lenders’ requests for credit facilities.⁸⁸

80. *Inner City Press*, 463 F.3d at 242.

81. *Id.*

82. *Id.* More specifically, Exhibit Three contained the names of nine Wachovia clients that make and/or purchase subprime home mortgage loans; amounts and terms of the credit extended by Wachovia to these subprime lending clients; descriptions of the services Wachovia offers these subprime lending clients; Wachovia’s “due diligence” procedures used to manage its relationships with subprime lenders; and further financial data regarding Wachovia’s relationships with these subprime lending clients. *Id.* at 242–43.

83. *Id.* at 243; *see also* 5 U.S.C. § 552 (2006).

84. *See* 12 C.F.R. § 228.43 (2008).

85. Richard Marsico, *A Guide to Enforcing the Community Reinvestment Act*, 20 *FORDHAM URB. L.J.* 165, 170 (1993).

86. *See* Robert C. Art, *Social Responsibility in Bank Credit Decisions: The Community Reinvestment Act One Decade Later*, 18 *PAC. L.J.* 1071, 1075 (1987) (“The primary force for change has not been the agencies themselves, but rather community groups which have accrued important new leverage in negotiations with depository institutions.”); Marsico, *supra* note 85, at 171.

87. *Inner City Press*, 463 F.3d at 243.

88. *Id.* at 242–43.

The FRB refused to release Exhibit Three, claiming that the information was exempt from release under FOIA Exemption 4.⁸⁹ However, this information may be crucial to a community group's ability to accurately evaluate a bank's CRA performance in the community.⁹⁰

The district court held that parts (i), (ii), and (iii) of Exhibit Three were confidential and not subject to disclosure.⁹¹ The court did not explicitly apply the *Critical Mass* rule in its decision, and the parties did not argue for its adoption; thus the Second Circuit noted that it would not adopt the *Critical Mass* rule *sua sponte*.⁹² However, the district court's decision was founded, in part, upon the fact that the bank voluntarily submitted the information to the regulatory authorities.⁹³ "Because the district court found that Wachovia voluntarily rather than mandatorily submitted the names to the Board, the court did not find a presumption against impairment of the government's ability to obtain information."⁹⁴ In essence, the district court used the reasoning of *Critical Mass* without citing *Critical Mass* for support. And the Court of Appeals affirmed the decision while offering a thinly veiled invitation for future litigants to argue for the outright adoption of *Critical Mass*.⁹⁵

Ultimately, the Second Circuit reasoned that if Wachovia was not compelled by the FRB to submit the information about its subprime lending clients, then the submission of that information should be considered voluntary and should remain confidential.⁹⁶ Therefore, the *Inner City Press* holding requires a plaintiff seeking CRA information under FOIA to prove that the regulatory agency asserted its au-

89. Exemption 4 is for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4) (2006). "[I]nformation is confidential for the purposes of Exemption 4 if its disclosure would have the effect either: 1) of impairing the government's ability to obtain [necessary] information . . . in the future, or 2) of causing substantial harm to the competitive position of the person from whom the information was obtained. *Inner City Press*, 463 F.3d at 244 (citing *Cont'l Stock Transfer & Trust Co. v. SEC*, 566 F.2d 373, 375 (2d. Cir. 1977)).

90. See *Engel & McCoy*, *supra* note 40. For example, certain subprime lenders may be under investigation by state and federal authorities, others may have actually been found guilty of violations of the Truth in Lending Act of 1968, 15 U.S.C. § 1601 (2000). If advocates cannot determine which subprime lenders have dealings with their banks, and the volume of these transactions that take place, then they cannot possibly make an accurate determination whether their bank is engaging in harmful activity in their community.

91. *Inner City Press*, 463 F.3d at 243.

92. *Id.* at 245 n.6.

93. *Inner City Press/Cmty. on the Move v. Bd. of Governors of the Fed. Reserve Sys.*, 380 F. Supp. 2d 211, 218 (S.D.N.Y. 2005).

94. *Inner City Press*, 463 F.3d at 246.

95. *Id.* at 245.

96. *Id.* at 246–48. The court noted divergent holdings on this "impairment" issue within the District Court of the District of Columbia. Compare *Parker v. Bureau of Land Mgmt.*, 141 F. Supp. 2d 71, 78 n.6 (D.D.C. 2001) (holding that "[i]n addition to possessing the authority to compel submission, the agency must also exercise that authority in order for a submission to be deemed mandatory"), with *Teich v. FDA*, 751 F. Supp. 243, 251 (D.D.C. 1990) (holding that "where compelled cooperation will obtain precisely the same results as voluntary cooperation, an impairment claim cannot be countenanced").

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thority to compel disclosure before such information is deemed “mandatory” under the *National Parks* test.⁹⁷ In essence, the court applied the *Critical Mass* rule, without expressly adopting it because the analysis stopped once the court determined that the information was submitted voluntarily. The essence of *Critical Mass* is that it creates a categorical exemption for voluntarily submitted information—eliminating an advocate’s ability to argue that, although the information was voluntarily provided, it should nonetheless be disclosed for reasons x, y, and z. Thus, in *Inner City Press*, the court applied the *Critical Mass* rule because it did not conduct any analysis regarding the nature of the information sought. Instead, the court determined that the information was voluntarily provided and therefore categorically exempt.

VI. THE INTERSECTION OF *CRITICAL MASS* AND THE CRA

Application of the *Critical Mass* rule in the context of FOIA requests for CRA information dramatically increases the burden on CRA advocates by requiring them to prove that banks were compelled to disclose information pursuant to a directive by a regulatory agency. This increased burden may make it impossible for advocates to obtain the information they seek. The CRA does not explicitly detail every piece of information that regulators may compel banks to submit when conducting performance evaluations and reviewing merger applications—which will undoubtedly make it difficult for advocates to prove that the information they seek was a compelled disclosure.⁹⁸ In addition, new lending and investment products are constantly evolving in the banking industry, making it unrealistic for Congress to maintain a list of compelled disclosures.

Under the *Critical Mass* rule, statutes like the CRA, which do not enumerate precisely what information the regulatory agency may compel to be disclosed, are eviscerated of what little power they have to induce accountability in the banking industry. The artificial voluntary-versus-compelled *Critical Mass* analysis will allow these regulatory agencies to simply avoid the risk of future litigation by never asserting any authority to compel information.⁹⁹ This path-of-least-resistance will clearly promote stronger relationships between banks and their regulators, but will do so to the detriment of communities seeking their rightful access to information regarding the community economic development practices of their banks.¹⁰⁰

97. *Inner City Press*, 463 F.3d at 247–48.

98. See generally MARSICO, *supra* note 4, at 113–20 (noting that the CRA compliance manuals used by the regulatory agencies do “not require examiners to use a fixed set of evaluative criteria composed of quantitative measures of bank lending, quantitative benchmarks of community credit needs, and objective terms for evaluating bank lending” and that “[t]he standards for evaluating bank lending are subjective”).

99. See Reply Brief of Appellant at 9, *Inner City Press v. Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239 (2d Cir. 2006) (No. 05-6162).

100. See *Critical Mass*, 975 F.2d at 885 (Ginsburg, J., dissenting). Judge Ginsburg warned: Henceforth, in this circuit, it will do for an agency official to agree with the submitter’s ascription of confidential status to the information. There will be no objective check on, no judicial review alert to, “the temptation of government and business officials to follow

In *Inner City Press*, the information that was found to be confidential—the credit terms, relationships, and number of investments maintained by Wachovia with commercial customers that make and/or purchase subprime residential mortgage loans—is precisely the type of information that advocates must have in order to comment on a bank’s community economic development activities.¹⁰¹ Asking regulators and communities to assess a bank’s community reinvestment practices without this information is like asking a building inspector to merely review the exterior of a home—there may be a fresh coat of paint and a flower box in the window, but there may also be a flood in the basement, termites in the foundation, and no insulation. In other words, a bank may have loans and investments that count toward its community reinvestment rating, but if it also has a portfolio of investments in subprime loans that is ten, twenty, or one hundred times the size of its community reinvestment loan portfolio, can regulators truly determine that this bank has a satisfactory CRA rating?¹⁰² Can community advocates accurately understand the bank’s activities in their neighborhood?

A far more practical approach was in place under the *National Parks* test, which required the court to address two fundamental questions: would the government be impaired by disclosure of the information, and would the entity be at a competitive disadvantage if the information were made public? If the answer to either of these questions is no, then it should not matter whether the entity volunteered the information or was compelled to disclose the information.¹⁰³ Furthermore, the *Critical Mass* rule is not in line with the reasoning behind FOIA and the *National Parks* two-part test interpreting Exemption 4.¹⁰⁴ In the context of the CRA, the *Critical Mass* rule is not the perfect “one size fits all” standard that the D.C. Circuit believed it to be.

The *National Parks* test incorporates the careful balancing of interests that Congress had in mind when drafting FOIA. This balancing test compares the agency’s interest in obtaining future information from the organizations it regulates with the requestor’s asserted right to the disclosure of the information. Such a balancing test requires courts to undergo a more searching review of the statutory basis for the requestor’s claim, and to conduct statutory interpretation to determine whether the governmental agency has the legal authority to compel the information—regardless of whether it was “voluntarily” submitted. Moreover, the agency’s authority to compel the information sought should be the primary issue that determines whether

the path of least resistance and say ‘confidential’ whenever they seek to satisfy the government’s vast information needs.”

Id. (citation omitted).

101. *Inner City Press*, 463 F.3d at 243.

102. See Brief for Defendant-Appellee at 6 n.2, *Inner City Press v. Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239 (2d Cir. 2006) (noting that while Wachovia “does not originate subprime loans, [it] provides credit facilities to commercial customers engaged in subprime lending”).

103. See *Critical Mass*, 975 F.2d at 884 (Ginsburg, J., dissenting).

104. *Id.* at 882.

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Exemption 4 applies, and evidence that the agency actually asserted this authority should be irrelevant. Such a test would be more congruent with the purposes of FOIA and the CRA.

VII. CONCLUSION

In *Critical Mass*, Circuit Judge Ruth Bader Ginsburg wrote a prophetic dissent in which she questioned the D.C. Circuit's decision to modify the *National Parks* test.¹⁰⁵ One of her strongest arguments against this new distinction between voluntary and mandatory disclosures was that it would encourage regulatory agencies to seek the path of least resistance by only accepting voluntary submissions of business information from organizations, effectively placing all business information under this new protected category of confidential information.¹⁰⁶ This is precisely the scenario that was before the court in *Inner City Press*. The *Critical Mass* rule, as applied to FOIA requests for CRA information, removes vital checks and balances from the system and encourages a further diminution of community advocates' rights against predatory lenders.

105. *Id.*

106. *Id.* at 884 (“Thus the court’s new exemption 4 test, devised for voluntary submissions, is all the more difficult to reconcile with Congress’ unmistakably clear direction: ‘The mandate of the FOIA calls for broad disclosure of Government records,’ and ‘for this reason FOIA exemptions are to be narrowly construed.’”) (citations and punctuation omitted).